
ARNOLD & PORTER

July 27, 2004

VIA ELECTRONIC COMMENT FILING SYSTEM

Mr. Rick R. Chessen
Associate Bureau Chief, Digital Television Task Force
Media Bureau
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: *Digital Output Protection Technology and Recording Method*
Certifications: TiVoGuard Digital Output Protection Technology, MB
Docket No. 04-63

Digital Output Protection Technology and Recording Method
Certifications: Helix Device DRM Trusted Recorder and Helix Device
DRM Technology, MD Docket No. 04-65

Dear Mr. Chessen:

This letter is written on behalf of the Office of the Commissioner of Baseball, which represents the thirty Major League Baseball clubs ("Baseball"). Baseball strongly opposes the above-referenced applications insofar as they seek certifications of technologies that permit the distribution of digital programming without adequate proximity controls.

Baseball provides the American public with a significant amount of copyrighted programming consisting of analog and digital telecasts of live Major League Baseball games. These telecasts are currently available over-the-air on the FOX television network and on various local broadcast stations licensed by the individual clubs (such as the New York Yankees on WCBS-TV in New York.). Additional game telecasts are available to subscribers of cable and DBS services on national cable networks (ESPN and ESPN2) and on regional sports networks (such as the Boston Red Sox on the New England Sports Network). Baseball also offers fans the option to receive a large number of game telecasts not otherwise available in their local markets through its Extra Innings package, which is carried on DBS and on cable systems nationwide.

TiVo and RealNetworks have taken the position in this proceeding that the technologies for which they seek certification should allow users to distribute digital

Rick Chessen
July 27, 2004
Page 2

broadcast television programming (including digital broadcasts of Major League Baseball games) to personal computers and other devices without regard to the geographic location of those devices. Certification of such technologies absent the necessary proximity controls would undermine well-established Congressional and FCC policies; it would undercut Baseball's television licensing arrangements; and it would facilitate infringement of the copyrights in Baseball telecasts and other programming.

Indeed, both Congress and the Commission have recognized the importance of permitting sports leagues and clubs to black out telecasts of sporting events in certain circumstances. *See* 15 U.S.C. § 1291 *et seq.* ("Sports Broadcast Act"); 47 C.F.R. §§ 76.111 & 76.128 ("Sports Blackout Rule"). Under the Sports Blackout Rule, Baseball (like other sports leagues) has the right to require that cable operators and satellite carriers not retransmit the telecasts of the home games of a local team on imported distant broadcast stations when telecasts of those games are not available on local broadcast stations. That Rule is intended to help effectuate policies underlying the Sports Broadcast Act, which permits clubs to impose certain blackouts on games that are not sold out in advance. Absent proximity controls, however, users of the proposed TiVo and RealNetworks technologies could easily circumvent those policies by distributing digital broadcasts of games to geographical areas in which those games are not available on local broadcast stations.

Furthermore, individuals and commercial establishments may use the proposed TiVo and RealNetworks technologies to gain access to MLB game telecasts and other programming without paying requisite subscription fees. For example, a viewer might use the TiVoGuard technology to distribute the telecast of a local team's game to someone in the opposing team's market, who would no longer need to subscribe to the regional sports network in that market to receive a telecast of that game. Similarly, the same viewer could send the same telecast to someone in another television market, who would then no longer need to subscribe to Baseball's Extra Innings package to receive a telecast of that game. In either case, the lack of proximity controls on the TiVoGuard technology would result in the avoidance of subscription fees that are essential to ensure the continued supply of Baseball programming.

We understand that the National Football League ("NFL") has filed an *ex parte* letter expressing its own concerns that the lack of proximity controls on such devices will threaten the NFL's regionalized structure for licensing the rights to telecasts of NFL games. *See* Letter dated June 24, 2004 from Frank Hawkins, Senior Vice President of Business Affairs, NFL, to Rick Chessen, FCC Media Bureau. As a result, the NFL

Rick Chessen
July 27, 2004
Page 3

advocates that the Commission condition the interim certification of Covered Demodulator Products – including the products offered by TiVo and RealNetworks – on the incorporation of a proximity limitation. Baseball agrees with the views expressed by the NFL in that *ex parte* presentation.

Finally, Baseball wishes to emphasize that, consistent with the position it previously articulated before the Commission, any technology that allows for access to digital broadcast content must be consistent with the Copyright Act. *See* Comments of the Office of the Commissioner, *et al.* at 6-7, Docket No. 02-230. To the extent that the lack of proximity controls on the TiVo Guard and Helix Device allow users to make reproductions of telecasts not permitted by the Copyright Act, Baseball believes that the Commission should not certify such technologies for use in recording and/or distributing digital broadcast technology. To this point, the only reproductions of copyrighted programming permitted under the Copyright Act are the one-use copies created when viewers “time shift” over-the-air programming originally broadcast at one time to watch at another time via a recording technology. *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

Sincerely,

Robert Alan Garrett
Christopher Winters

*Counsel to the Office of the Commissioner
of Baseball*